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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 193

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTORS OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONERS.

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CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PETITIONERS.

JURISDICTION OF THIS COURT.

This is a suit brought by petitioners, executrices of the estate of Gustave E. Shukert, deceased, plaintiffs, in the United States District Court for the District of Nebraska, Omaha Division, against the respondent to recover a federal estate tax paid under protest after a claim for refund thereof had been denied by the Commissioner of Internal Revenue.

The tax was levied under Section 401 of the Revenue Act of 1918, enacted February 24, 1919 (40 Stat. 1057, 1096, c. 18, § 401).

Judgment was rendered against the petitioners by the District Court on May 24, 1924. (Rec., 14.)

The case is reported as *Shukert* v. *Allen*, 300 Fed. 754.

On a writ of error the judgment of the District Court was affirmed by the Circuit Court of Appeals for the Eighth Circuit on May 15, 1925. (Rec., 126.)

The opinion of the Circuit Court of Appeals is reported as *Shukert* v. *Allen*, 6 Fed. (2d) 551.

The case is before this court on a writ of certiorari granted by this court on October 19, 1925 (Rec., 127), pursuant to Section 240 of the Judicial Code as amended.

Statement of the Case.

There is presented to the court for decision in this case the question whether property which has been transferred absolutely by a decedent in his lifetime, and not in contemplation of death, and in which he has reserved no interest, should be included in his gross estate in determining the value of his estate for the purpose of the levy thereon of an estate tax under Title IV of the Revenue Act of 1918.

Gustave A. Shukert was a resident of Omaha, Nebraska. On May 5, 1921, he transferred to the United States Trust Company of Omaha, as trustee, by a deed of trust of that date, personal property consisting of notes which matured at intervals ending February 1, 1951, secured by first mortgage on real estate and Liberty Bonds, all of a nominal value of $225,000, but found to have an actual value of $190,157.55, at the time of Shukert's death. (Rec., 21.)

We attach to this brief as Appendix I a copy of the deed of trust as it appears in the record. (Rec., 9.)

The beneficiaries of the trust named in the deed were his three children, Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert. The trust was voluntary and without money consideration. Shukert, however, by the deed parted with all his title and interest in the trust property and reserved no interest therein of any kind whatsoever. He reserved no power of revocation or amendment and no right of control over the trust estate.

The deed of trust became effective as an executed trust at the time of its delivery on May 5, 1921. Thereupon the rights of the beneficiaries under the deed became fixed.

The trust deed provided that the Trustee should invest and reinvest, manage and control the trust property; that it should accumulate the income in order to increase the principal of the fund, except that small payments not to exceed $250 per month in any month might be made to his wife (who was not otherwise a beneficiary of the trust) or to any beneficiary, in case of extreme destitution and lack of the necessities of life.

The deed of trust then provided as follows:

"This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above named children of the Founder shall

die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issue shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita."

It will be noted that the date fixed for the termination of the trust coincided with the date of maturity of the last maturing note transferred by the deed of trust.

The deed of trust contained further provisions relating to the duties of the trustee as to investments, the right of the founder to add additional property to the trust estate, the right of compensation to the trustee for services, in a sum equal to three per cent of the income of the trust estate, and the making of annual reports to the wife of the founder and to each of the beneficiaries under the trust deed.

It will be observed that the entire income of the trust estate, less the compensation of the trustee, and possible payments to the wife and beneficiaries for the bare necessities of life, was to be accumulated until the termination of the trust. The trust was to terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries named in the deed of trust should have occurred more than twenty-one years prior to February 1, 1951, in which case the trust

was to terminate twenty-one years after the death of said survivor.

At the termination of the trust the principal and undistributed income were to be paid to and divided among the named beneficiaries.

Shukert was fifty-six years of age on March 22, 1921. (Rec., 65.)

At the time of the execution of the trust his daughter Flora was twenty-one years of age, his son Gustave was fifteen years of age, and his daughter Isabel, the oldest child, was more than twenty-one years of age. (Rec., 61.)

He died on September 29, 1921. (Rec., 35.)

He executed his will on September 27, 1921. (Rec., 53.) A copy of the will appears at Rec. 55.

After his death the executrices of his estate filed a return for federal estate tax, showing a total tax due of $26,921.51. (Rec., 98.) This tax was duly paid.

Subsequently on a review and audit of the return the Commissioner of Internal Revenue assessed an additional tax against the estate of $13,685.97. (Rec., 99.)

This additional tax resulted from including as part of the gross estate the properties which had been transferred by the deed of May 5, 1921.

The additional tax was paid under protest on June 28, 1923. (Rec., 13.)

A claim for refund was filed on July 3, 1923, and was denied by the Commissioner of Internal Revenue on November 23, 1923. (Rec., 6, 13.) The Commissioner denied the claim for refund on the ground that the trust of May 5, 1921, had been created by Shukert in contemplation of death. (Rec., 7, 8, 13.)

This suit to recover the tax was filed February 26, 1924. (Rec., 1.)

The case was tried in the District Court on the theory that it involved the taxation of a gift made in contemplation of death.

At the conclusion of the testimony counsel for plaintiffs moved the court to instruct the jury to return a verdict for the plaintiffs (Rec., 112), and the defendant's counsel moved the court to instruct the jury to return a verdict for the defendant "on the ground that the undisputed evidence shows a trust agreement created by Gustave E. Shukert in his lifetime which was intended to take effect in possession and enjoyment after his death." (Rec., 112.)

Thereupon after argument upon these motions counsel for plaintiffs offered instructions on the law relating to the taxability of gifts made in contemplation of death. (Rec., 113-114.) Defendant's counsel offered instructions on the same matter. (Rec., 114-117.)

The court refused to give any of the instructions asked relating to gifts in contemplation of death and at the request of the defendant instructed the jury as follows:

> "You are instructed that under the undisputed evidence the trust created by Gustave E. Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death and that your verdict should be for the defendant." (Rec., 114, 119.)

The contention of petitioners is that the deed of trust of May 5, 1921, was an absolute and immediate transfer made by Shukert in his lifetime of all interest in the property transferred thereby; that at the time of his death he had no interest therein of any kind; that no interest in said

property passed from him at his death; that the deed was an executed transfer *inter vivos* not in contemplation of death; that therefore the transfer was not within the provision of Section 401 of the Revenue Act of 1918 which imposes a tax upon the transfer of the net estate of a decedent or within Section 402 (c) relating to transfers taking effect at or after death; and that as a result the value of the property transferred should not have been included in fixing the value of his estate for the purpose of the federal estate tax.

Specification of Errors.

The question presented in this case and the errors relied upon by petitioners as set up in the petition for the writ of certiorari and brief in support thereof are:

1. The lower courts erred in holding that the trust created by Shukert of the property described therein was a trust intended to take effect in possession or enjoyment at or after his death within the meaning of Section 401 and Section 402 (c) of the Revenue Act of 1918 and that the value of the trust property should have been included in the value of the gross estate of Shukert after his death for the purpose of determining the estate tax payable under said act.

2. The trial court erred in sustaining respondent's motion for a directed verdict and the Circuit Court of Appeals erred in affirming the judgment of the trial court.

3. The trial court, having erred in instructing the jury to find for the respondent, erred further in refusing to submit to the jury the issue as to whether or not said trust was created by Shukert in contemplation of death.

SUMMARY OF ARGUMENT.

I.

(a)

The trust transfer involved in this case was an absolute transfer by the decedent in his lifetime of all his right, title and interest in and to the trust property both principal and income.

He retained no title or interest which he could pass or transmit at his death.

Sec. 401 of the Revenue Act of 1918 imposes an excise tax upon transfers at death.

It imposes no other tax.

Since nothing passed from the decedent at his death under the trust transfer, the transfer is not taxed by the statute.

(b)

Sec. 402 (c) of the statute provides that there shall be included in a decedent's estate the value of property of which he has made a transfer or trust in contemplation of or intended to take effect in possession or enjoyment at or after death.

This section of the statute does not impose a tax.

It should not be so construed as to enlarge the transfers which are taxed by Sec. 401, viz.: transfers at death.

Transfers in contemplation of death and transfers of property, possession or enjoyment of the principal or income of which is retained by the transferror, become

effective at death and are transfers at death which are taxed by Sec. 401.

But transfers made by a decedent in his lifetime under which he retains no title or interest to pass at his death are not transfers at death and are not taxed by Sec. 401.

Sec. 402 (c) should not be construed to include such transfers unless the language used admits of no other construction.

The language used clearly admits of the construction that the transfers defined by the section are transfers of property retained by the transferror, either as to principal or income, in his own possession and enjoyment until his death.

Such transfers are transfers at death and are taxed by Sec. 401.

This construction of Sec. 402 (c) eliminates all conflict between Sec. 401 and Sec. 402 (c) and all constitutional questions and should be adopted.

II.

Shukert by his deed of trust of May 5, 1921, transferred the possession of the trust property to a trustee for his children. They enjoyed substantial interests in the property from the date of its delivery. They had vested interests in the trust property. The trust income began to accumulate at once for their benefit. The acquired the right to sell and transfer their interests.

The trust transfer took effect in possession and enjoyment in the children upon its delivery within the meaning of Sec. 402 (c).

III.

The judgments of the District Court and of the Circuit Court of Appeals are erroneous and should be reversed.

The case should be remanded for a new trial.

ARGUMENT.

(a)

The Revenue Act of 1918 was in force at the time of Shukert's death and controls the taxation of his estate.

The relevant provisions of the Act are as follows:

"SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1918, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) *is hereby imposed upon the transfer of the net estate of every decedent dying* after the passage of this Act, whether a resident or nonresident of the United States: (Italics ours)

* * * * *

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time *made a transfer or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death* (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (Italics ours.)

* * * * *

> "SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—" (certain deductions named in (1) to (4).)

These sections are part of Title IV of the Revenue Act, entitled "Estate Tax."

Title IV deals with taxes upon the transfer of decedents' estates.

Taxes on the transfer of decedents' estates are referred to as estate taxes, inheritance taxes, legacy taxes, death duties, etc.

By whatever name called they are excise taxes imposed upon the privilege of transmitting property at death. This privilege is one which is subject to legislative regulation and taxation.

Such taxes may be imposed by the United States.

> *New York Trust Company* v. *Eisner*, 256 U. S. 345.

Brief quotations from *Knowlton* v. *Moore*, 178 U. S. 41, in which this court considered at length the subject of taxation upon decedents' estates, will define the nature of such taxes.

After reviewing the whole field of such taxation this court said:

> "Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that *death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living,* on which such taxes

are more immediately rested." (p. 56.) (Italics ours.)

* * * * *

"Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is *the power to transmit or the transmission or receipt of property by death* which is the subject levied upon by all death duties." (p. 57.) (Italics ours.)

* * * * * *

"It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern *the passing of property by death, for if there was no property to transmit there would be nothing upon which the tax levied on the occasion of death could be computed.*" (p. 78.) (Italics ours.)

In the work of Gleason and Otis on Inheritance Taxes (3rd ed.), p. 27, is found a definition of inheritance taxes which is frequently quoted:

> "It is not a transfer between the living that is taxed, but *a transfer from the dead hand to the living hand;* therefore, it is the doctrine * * * that the transfer which is the subject of the tax takes place at death." (Italics ours.)

As stated above in the *Knowlton* case, inheritance taxes may be levied upon either the transmission or the receipt of property by death.

It is important in this case to bear in mind that this court has construed the Revenue Act of 1918 to impose a tax upon the *transmission* and not upon the *receipt* of property by death.

In the case of *Y. M. C. A.* v. *Davis*, 264 U. S. 47, the residuary legatee under a will claimed that it was a charitable corporation and that its legacy was exempt from tax under the Revenue Act of 1918. This court

held that the tax imposed by the Act was upon the right to transfer at death and not upon the right to receive, and said:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49." (p. 50.)

A similar question was before the court in *Edwards* v. *Slocum*, 264 U. S. 61, and the court in that case said:

> "But this is not a tax upon the residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.' It levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. It thus manifestly assumes that the net estate will be ascertained before the tax is computed." (pp. 62, 63.)

See, also, *U. S.* v. *Perkins*, 163 U. S. 625.

Coming then to an examination of the provisions of Section 401 of the act in question, we find that it is the only section in Title IV of the act which purports to impose a tax upon the transfer of decedents' estates.

Authority for the imposition of a tax in any case, if such authority exists, must be found in that section. All transfers which are to be subjected to a tax under

Title IV must be brought within the language and intent of Sec. 401.

This section imposes a tax "upon the transfer of the net estate of every decedent dying after the passage of this act."

While the section does not state in words that the tax is imposed upon a transfer *at death*, the language used admits of no other reasonable construction.

The use of the words "net estate" of the "decedent dying" clearly refers to the property which a man possesses at the time of his death. A tax upon the transfer of such property must of necessity be imposed at death. It cannot be successfully contended that the transfers referred to in the section are transfers "at any time," or that this language is broad enough to include transfers by the decedent in his lifetime.

It was clearly the purpose of Congress by this section to impose an excise tax upon the privilege of *transferring property at death.* If there is no transfer of property by decedent at his death, no tax is imposed.

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner." *Davis case,* 264 U. S. 47-50.

In the case at bar Shukert at the time of his death had no title or interest in the property described in the deed of trust which he could transmit. He had parted in his lifetime with every vestige of title, interest and control in and over the property.

He had at death no right or privilege of transmitting the trust property upon which the statute could operate.

Our contention therefore is that the statute imposes no tax in this case.

(b)

The District Court and the Circuit Court of Appeals held however that the statute imposed a tax upon his transfer of the property in his lifetime, because the transfer was made to take effect in possession or enjoyment after his death and therefore came within the provisions of Sec. 402 (c) quoted above.

Paragraphs (a) to (f) of Sec. 402 relate to property which shall be included in determining the value of the estate the transfer of which is taxed by Sec. 401. They do not purport to assess a tax; they define the estate upon the transfer of which a tax has been previously imposed by the act.

We submit that it was not the purpose of Congress by these paragraphs to broaden the scope of Sec. 401 to include transfers of property which were not taxed under Sec. 401. It was not the purpose of Congress by these paragraphs to provide for the imposing of excise taxes upon any other privilege than the privilege of transmitting property at death and these provisions should be so construed that their application is limited to the transfer of property passing at death.

Our contention is illustrated by the case of *Blount* v. *U. S.* 59 Court of Claims 328. In that case the value of an estate held by a husband and wife by the entirety was included as part of the husband's estate pursuant to paragraph (d) of Sec. 402, which provides for the inclusion in the net estate of the value of interests held in the entirety. The court held that nothing passed from the husband at his death; that the estate continued in the wife; that as nothing passed from the husband at his death no tax was imposed by Sec. 401, and that paragraph (d) should not be construed to include an interest which did not pass at death.

The same conclusion was reached by the Board of Tax Appeals in the case of *Root* v. *Commissioner,* Decision 1954, 1926 Commerce Clearing House, 3655, and in the case of *Dyer* v. *Commissioner,* Decision 1951, 1926 Commerce Clearing House, 3649, both decided on November 30, 1926. Both of these cases involved the taxation of estates by the entirety.

We contend that the conclusion reached in the cases just cited is sound and that Sec. 402, which merely defines the estate, the transfer of which is taxed by Sec. 401 should not be so construed as to include transfers not made at death and not taxed by Sec. 401.

In the case at bar the Circuit Court of Appeals held that although Stuckert had parted with all interest in the property, yet inasmuch as the beneficial interest in the property conveyed was not intended to vest in possession in the beneficiaries until after Shukert's death, the value of the property transferred was properly included in his estate under Sec. 402 (c).

In commenting upon the Shukert Case, 6 Fed. (2d) the Judge of the District Court of Massachusetts, in *Bradley* v. *Nichols,* 13 Fed. (2nd) 857, said:

> "To say that property which has been completely given away and upon the disposition of which the donor's death has no effect is still part of the donor's estate is to say something which is simply not true." (p. 859.)

What, then, is the proper construction of Sec. 402 (c) which provides for including in the value of the estate of a decedent the value at his death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has at any time created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death"?

The Court of Appeals in its opinion drew a distinction between a transfer and a trust. But, in construing a statute which purports to tax transfers at death, it seems to us immaterial whether the transfer is by trust or otherwise.

The corresponding section of the Revenue Act of 1926 (Stat. 1925, 1926, part 1, page 70, Sec. 302 (c)) uses the words "a transfer by trust or otherwise." This, we contend, is the meaning of the words used in Sec. 402 (c) which we are now considering. The term transfer is broad enough to include a transfer in trust and in this argument we use the term in its broadest meaning.

It is our contention that it was the purpose of Congress by these provisions to include property the possession or enjoyment of which the decedent had retained up to the time of his death, so that the property in reality passed *from him at his death*, although it had been previously in form transferred.

In construing paragraph (c) we keep in mind the clearly expressed purpose of Congress to tax the transmission of property at death, and we also keep in mind the decision of this court in the *Davis* case, *supra*, 264 U. S. 47, that the act in question is not a tax upon the succession and receipt of benefits but is a tax upon the interest of a decedent which ceased by reason of his death.

Property which a man possesses or enjoys up to the time of his death, passes from him and is transmitted by him at the time of his death. He has had the enjoyment of it to the last possible point of time. He relinquishes its enjoyment only when death takes it from him. The transfer of such propertly really takes effect at death and the transfer would properly be held to be within a statute taxing a transfer at death.

We find, then, that Sec. 402 (c) includes in a decedent's estate the value of property transferred in contemplation of death. If a man holds on to his property until death stares him in the face—until, to paraphrase the language of the *Knowlton* case, *supra,* 178 U. S. 41, "death becomes the generating source of his transfer," he transfers his property at death, and his privilege of so doing is properly taxable.

The same situation obtains when a man transfers his property in his lifetime and retains possession or enjoyment until the time of his death. His property in reality is transferred at death and his original transfer should be taxed as one made at death. *His property is transmitted by him, to all practical intents and purposes, at death.*

We contend that Sec. 402 (c), relating to transfers intended to take effect in possession or enjoyment, etc. should be construed to define this class of transfers exclusively,—that is, transfers wherein possession or enjoyment is retained by the grantor until his death. So construed the section provides for including in a decedent's estate the value of property which he has in effect transmitted at death. It defines a transfer which is taxed by Sec. 401.

On the contrary, if Sec. 402 (c) is construed to define property which the decedent has transferred in his lifetime without reserving any interest either in the principal or the income so that nothing passes at the decedent's death, then it would define a transfer which is not taxed by Sec. 401 and a conflict between the sections arises.

Furthermore the statute should be strictly construed in favor of the tax payer. It should not be construed

to assess a tax unless the intention to do so is clear beyond question.

Treat v. *Whitt*, 181 U. S. 264, 267.
Gould v. *Gould*, 245 U. S. 151, 153.
United States v. *Merriam*, 263 U. S. 179, 187.

Sec. 402 (c) defines, as proper to be included in a decedent's estate, any interest in property of which he has made a transfer or trust "intended to take effect in possession or enjoyment at or after his death."

Can the quoted language be reasonably construed to refer only to property the possession or enjoyment of which has been retained by the grantor to the time of his death?

The property referred to is the property of the decedent. Intention with reference to its disposition is *his* intention. The possession or enjoyment referred to is *his* possession or enjoyment.

We contend that it is logical and natural to construe the words "possession or enjoyment" to refer to the possession or enjoyment of the grantor at his death and to the passage of such possession or enjoyment at or after his death.

The language so construed, defines a transfer or trust intended by the grantor to become effective as to his possession or enjoyment at or after his death.

If the language is so construed, it defines a transfer or trust which is taxed by Sec. 401, because possession or enjoyment reserved by the grantor passes from him at or after his death.

On the other hand, if the language were construed to define and include a transfer or trust under which no interest is reserved by the grantor so that nothing passes

from or is transmitted by him at his death, then it would define a transfer which is not taxed by Sec. 401.

The statute in question, as this court stated in the *Davis* case, *supra*, 264 U. S. 47, does not purport to impose a tax upon the *receipt* of property after death, but upon the *passing* of property at death. It does not impose a succession tax. Under the statute is is immaterial when the beneficiaries succeed to property transferred.

There is no basis, therefore, in the statute for measuring the value of a decedent's estate by the value of property transferred absolutely by him in his lifetime because it does not vest in possession or enjoyment in the grantees until after his death.

We respectfully contend that Sec. 402 (c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until at or after his death. It is only by such construction that the subject matter of the transfer can be brought within the purpose and language of the taxing clause of the statute.

This construction also avoids a possible question as to the constitutionality of the statute.

This construction eliminates the question whether the act is intended to apply to transfers *inter vivos*. The constitutionality of an act to tax such transfers has been seriously questioned.

McNeir v. *Anderson*, 10 Fed. (2d) 813.

Le Feber v. *Wilkinson*, (Wis. Dist. Ct.) 1926 Commerce Clearing House, 7673.

Blodgett v. *Holden* (C. C. A. 6th Circuit. Not yet reported, certified to the Supreme Court on questions of constitutionality).

It eliminates the question whether Congress has a con-

stitutional right in fixing an estate tax to measure the value of the decedent's estate by adding the value of property which did not pass from him at his death.

Llewellyn v. *Frick*, 268 U. S. 238, 239.

We contend therefore that the transfer in trust from Shukert is not within the meaning of Sec. 402 (c) properly construed and that the property transferred thereby should not be included as part of his taxable estate.

It was recognized by the trial court that the transfer made by the Stuckert trust deed would not normally be subject to an inheritance tax. In his charge to the jury the court said:

> "Now in the absence of an express provision of the statute *a tax on inheritances certainly would not reach that conveyance.* (Rec., 118.) * * * It is conceded that Shukert had a right to make an absolute gift at that time of his property and it would not have been taxable under the Statute, but that is not what he did and this Statute was intended clearly, as it seems to me, *to reach out beyond the ordinary operation of the law of inheritance* and reach these transactions, proper transactions, lawful transactions, no question of that kind involved that there is anything wrong about it, and no trick about it, and no device or any intention to defeat any tax manifested here, but that the express language of the Statute *reaches out beyond the ordinary operation of the law of inheritance* and reaches and extends to these trusts." (Rec., 119.) (Italics ours.)

Obviously the court was of the opinion that an absolute deed by a man in his lifetime was not ordinarily a subject for an inheritance tax. Some statute had to *reach out* for it and bring it where it did not normally belong.

We submit that statutes imposing taxes should not be

so construed that they *reach out* for subject matters of taxation not ordinarily within their scope.

A reasonable construction which does not result in such *reaching out* should be adopted.

We therefore contend that, *reasonably* construed, the provisions of Sec. 402 (c) should be limited in their scope to transfers of property, the possession or enjoyment of which was retained by the transferror until his death, such transfers being in effect made at death and being taxed by Sec. 401.

A provision taxing transfers intended to take effect in possession or enjoyment after death appeared for the first time in a statute passed by Pennsylvania in 1826.

> Digest of Acts of Assembly of Pennsylvania, 1824 to 1829, p. 19.

The decisions of the courts of Pennsylvania construing the statute support our contention in this case.

In *Wright's Appeal* (1861), 38 Pa. St. 507, a transfer in trust was taxed as part of the grantor's estate because the transfer reserved to him the income of the property for life.

In *Waugh's Appeal* (1875), 78 Pa. St. 436, the grantor deeded property, reserving the use of it so long as he lived. The property was taxed as part of his estate.

The case of *Reish* v. *Pennsylvania*, 106 Pa. 521, involved an absolute transfer by a decedent made ten days before his death; the grantee gave back a bond to pay the income of the property to the grantor. The transfer was taxed and the court said (p. 526):

> "The policy of the law will not permit the owner of an estate to defeat the plain provision of the collateral inheritance tax law by any device *which secures to him for life the income, possession and enjoyment thereof. It must be such a conveyance as*

parts with the possession, the title and the enjoyment in the grantor's lifetime." (Italics ours.)

To the same effect are *Lines Estate,* 155 Pa. 378, 26 Atl. 728; *Todd's Estate,* 237 Pa. 466, 85 Atl. 845.

But in Pennsylvania a transfer by which the grantor parts with all interest in the property is not taxed, although the principal of the estate is not to vest in the beneficiaries until long after the death of the grantor.

The case of *Dolan's Estate,* 279 Pa. 582, 124 Atl. 176, involved a trust under which the income was payable to the three sons of the grantor. The principal was to be distributed twenty-one years after the death of the last surviving lineal descendant living "at the time of the death of the grantor." The transfer was held not taxable either as to income or principal as the grantor had retained no interest in the trust estate.

The same trust conveyance was before the Federal Court on a claim that the transfer was subject to tax under the Revenue Act of 1918, and the transfer was not taxed.

Fidelity Trust Co. v. *McCaughn,* 1926 Commerce Clearing House 7648.

In *Dos Pasos on Inheritance Tax Law,* 2nd Ed. p. 329, the author reviewed the Pennsylvania cases and said:

"* * * The general rule established by these authorities is that the tax is payable on all property transferred by deed, grant, etc., to collateral or lineal heirs or strangers made or intended to take effect in possession or enjoyment at, on, or after the death of the grantor or transferor, the policy of the law being not to permit the owner of an estate to evade or defeat the tax by any device which secures to him for life the income, profit, or enjoyment of an estate where, after death, the corpus of the estate or any part thereof shall inure to the benefit of persons who are not exempted. Hence,

it would seem that payment of the tax can only be defeated or avoided by such a *bona fide* conveyance as *parts absolutely* with the possession, title, and enjoyment in the grantor's lifetime. (Italics ours.)

* * * * *

* * * The manifest purpose of our collateral inheritance tax is to subject property limited by deed in the manner stated in the statute of taxation, *because it is still substantially the property of the grantor,* and does not actually pass, nor is it intended to pass, to the beneficiaries until his death, and hence it is essentially similar in that respect to a devolution of the property, by testacy or intestacy upon the death of the owner." (p. 333) (Italics ours.)

In New York State an inheritance tax law containing this same language has been in force since 1885, and has been often construed. In that connection it was said in one of the New York cases, decided in 1921:

Cochrane's Estate, 190 N. Y. Sup. 895, 902.

"It is significant that in every reported case in the Court of Appeals, where the gift was taxed, *the enjoyment of the income was retained by the donor.*" (Italics ours.)

The Illinois statutes have contained the same language since 1895.

In the case of *People* v. *Moir,* 207 Ill. 180, the grantor made gifts to his sons. It was contended that the gifts were made to take effect in possession and enjoyment after his death. The rents of the property went to a partnership in which the grantor owned a half interest, so that he indirectly received one-half of the rents of the deeded properties. Only to the extent of this one-half interest the property was taxed as part of his estate.

In the case of *People* v. *Kelly,* 218 Ill. 509, property was deeded in trust and the grantor reserved an interest during his life to the extent of $200 a month. Only to the

extent of the interest reserved the property was taxed as part of his estate.

In *Keeney's Estate*, 194 N. Y. 281, there was involved the taxation as part of the decedent's estate of property which she had conveyed upon trust to pay to her during life one-fourth of the income, to pay the remaining three-fourths of the income to her children, and after her death to transfer the principal to her children. Only one-fourth of the property was taxed as a part of her estate. The remainder of the property which passed to the children at her death *was not taxed.*

The case was affirmed in this court in *Keeney* v. *Comptroller*, 222 U. S. 525, but the question here discussed was not involved or decided.

To the same effect are:

Bullen v. *Wisconsin*, 240 U. S. 625.
Carter v. *Bugbee*, 92 N. J. L. 390.

We have found no reported case which goes to the length of this *Shukert* case, 6 Fed. (2d) 551, and which holds that transfers in trust are taxable unless all interests passing under the transfer come into the actual possession and enjoyment of the beneficiaries within the lifetime of the grantor. If this is the correct construction of the act, an estate tax would be levied on every executed trust which by its terms fixes the termination of the trust period at a date subsequent to the death of the grantor.

In *Keeney's Estate*, 194 N. Y. 281, *supra*, one-fourth of the trust estate in which the grantor had the income was taxed but three-fourths of the trust estate which were to vest in interest on the grantor's death were not taxed.

In the *Dolan* case, cited above, 279 Pa. 582, the trust could not possibly have terminated until long after the

decedent's death, as it was expressly provided in the deed of trust that the principal was to be distributed twenty-one years after the death of the last survivor of the lineal descendant "living at the time of the death of the grantor." Yet neither the principal nor the income was taxed. In referring to transfers intended to take effect in possession or enjoyment, etc., the court said:

> "To escape the latter provision a conveyance must be such as parts with possession, title and enjoyment in the grantor's lifetime." (p. 588.)

The words "intended to take effect in possession or enjoyment at or after death" appear in every inheritance tax statute enacted in this country beginning with the Pennsylvania statute enacted in 1826.

If they are applicable to remainders vesting in possession at a date which may be after the date of the grantor's death, it is strange that in some court at some time there has not been an adjudication to that effect.

It is no answer to our contentions in this case for respondent to claim that trusts like the Shukert trust are an evasion of the taxes imposed by the Revenue Act of 1918 and that Sec. 402 (c) was incorporated in the act to prevent such evasions.

An outright gift in trust is no more an evasion of the statute than an outright gift of money. In each case the donor's estate is depleted by the amount of the gift. He has less estate subject to inheritance tax at his death. But he has not evaded taxation in one case any more than in the other.

The remedy, if one is needed, can be provided by Congress. The gift tax in the Revenue Act of 1924 was passed to reach gifts of the kinds suggested above. The gift tax has been abandoned. We may assume therefore that Congress is no longer concerned with the loss of

revenue resulting from gifts not made in contemplation of death.

Why then should the courts be asked to legislate, by judicial construction, in a field which Congress has abandoned?

The Government is attempting in this case to tax a completed gift *inter vivos* under the pretense of levying an estate tax.

Our contention is still further supported by the uniform decisions of the courts in cases where attempts have been made to tax proceeds from a life insurance policy within the clause "to take effect in possession or enjoyment at or after death." In the case of a policy of life insurance payable to a beneficiary other than the estate of a decedent, it is obvious that the premiums paid by the decedent during his lifetime constitute, to the extent of the insurance bought by those premiums, a gift to the beneficiary named in the policy. It is also obvious that the beneficiary acquires the actual possession and enjoyment of nothing whatsoever until the death of the insured. Yet even in the cases where the insured, the decedent, has retained a power of revocation and change as to the beneficiary up to the date of his death, it has been uniformly held that the proceeds from such an insurance policy are not a transfer taking effect in possession or enjoyment at or after the death of the decedent.

Gleason & Otis Inheritance Taxation, 157.

In re Bullen's Estate, 143 Wis. 512; 128 N. W. 109.

In re Voorhees' Estate, 193 N. Y. Sup. 168.

In re Parson's Estate (N. Y.), 102 N. Y. Sup. 168.

Tyler v. *Treasurer,* 226 Mass. 306; 115 N. E. 300.

Frick v. *Lewellyn,* 298 Fed. 803.

The opinion of the District Court of Massachusetts in *Bradley* v. *Nichols*, 13 Fed. (2d) 857, states our contention in this case admirably. Mrs. Bradley, the decedent, contributed $730,000 to a trust fund, one-half of the income of which was payable to her for life, the remaining one-half to her children and, on her death, the principal went to the remaindermen. It was conceded that one-half of her contribution was taxable as part of her estate. The government contended that the whole sum was taxable. The court said:

> "It would be mere fiction to say that Mrs. Bradley expected to survive all her three daughters and their issue, or that her action was in any appreciable degree influenced by that consideration, and the government does not put its claim on any such ground. Its position is that, where 'the persons who will take the corpus upon the termination of the trust cannot be absolutely ascertained until after the death of the founder,' the property transferred is taxable as part of the estate of the transferor. The principle contended for is that, not only must the transfer of the property be absolute and complete before death but the trust must be complete before death to its final limitation, or the statute applies. That this is a very extreme view can hardly be denied. The argument is that the statute requires it.
>
> The present case goes much beyond *Coolidge* v. *Nichols* (D. C.) 4 F. (2d) 112, and *Safe Deposit Co.* v. *Tait* (D. C.) 295 F., 429, which dealt with trusts in which the donors reserved life estates, and in which it was held that the transaction considered as a whole amounted to a transfer of the property to take effect on the donor's death. *Shukert* v. *Allen, Collector*, 6 F. (2d) 551 (C. C. A. 8th), supports the government's contention that the language of the statutes refers to the time when the final possible *cestui* will get the benefit of the trust. On the other hand, in *Dexter* v. *Treasurer and Receiver General*, 243 Mass. 523, 137 N. E. 877, the Supreme Judicial Court of Massachusetts, construing a state statute, the language of which upon this point is practically identical with that of the federal statute under dis-

cussion, reached a very different conclusion, and held that what was meant by 'taking effect in possession or enjoyment' was the definite determination of interests, whether legal or equitable, and that if such interests are established during the donor's life, and are in no way contingent upon his death, 'the beneficial interest in the employment of the proceeds of the trust passed at the time of its execution. * * * The possession and enjoyment vested in the beneficiaries when the trust deed was delivered to the trustees. The deed passed the property from the donor and gave to the beneficiaries at that time the beneficial interest in it, and their enjoyment and possession of it was not contingent on the death of the donor.' Carroll, J. 243 Mass. 526, 137 N. E. 879. This seems to me a more reasonable view of the language and scope of such a statute as I am dealing with than that taken in *Shukert* v. *Allen, supra.*

(2) The United States has no power to tax gifts *inter vivos,* except to the extent that they are so related to the death of the donor as to constitute in fact an anticipated succession to his property. The extent to which the state may go in arbitrarily connecting gifts *inter vivos* with the donor's subsequent death occasioned a difference of opinion among the justices in *Schlesinger* v. *Wisconsin,* 46 S. Ct. 260, 70 L. Ed.—(March 1, 1926). Under the Shukert decision it would follow that the owner of property cannot give it away in such a manner that the final disposition of it is not ascertained at the time of the donor's death.

In effect that decision restricts the right of gift. This point is not referred to in the opinion and may not have been considered. With great respect to the learned court which decided *Shukert* v. *Allen,* the constitutionality of the statute so interpreted seems to me very doubtful. To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part of the donor's estate, is to say something which is simply not true. Certiorari has been granted by the Supreme Court in the Shukert case (46 S. Ct. 24, 70 L. Ed. .....), and it therefore lacks finality."

"Without undertaking to discuss the numerous decisions which have been referred to, I may say that in my judgment the law, in taxing as part of decedents' estates property of which they had completely divested themselves before death, has already gone to the extreme limit which can be candidly defended, and that the enormous extension of it contended for by the government in this case is not fairly within the contemplation and meaning of the statute in question, and, if it be within the meaning, the statute is to that extent unconstitutional."

In Shukert's deed of trust the beneficial interests of the children who are named as beneficiaries were definitely and finally fixed at the time of the delivery of the deed of trust. They were in no way contingent upon Shukert's death. The children had the same rights on the day following his death that they had on the day before. His death was not a factor in any way in determining the rights of the beneficiaries of the trust.

Shukert retained no interest of any kind in the trust estate. Nothing remained in him which he could transmit at his death.

We contend that his transfer was not within the language or the purpose of the taxing statute.

II.

As an additional and independent reason for the conclusion that this trust is not taxable, we submit that, even with reference to the beneficiaries of the trust, it did in fact take effect in possession and enjoyment in the grantees at the time of its execution and delivery.

There can be no question that the Shukert trust was a completely executed trust.

The definition of executed trusts is found in 2 Pomeroy's Equity (2nd ed.) Par. 1001, where it is said:

"A trust is executed when no act is necessary to

be done to give effect to it when the trust is fully and finally declared in the instrument creating it."

In Par. 998 the author said:

"If the donor makes a complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to a Trustee upon trust effectually created on behalf of the donee; or if he retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with all the beneficial estate—then in each of these instances the gift is valid, although voluntary; the donee's rights are perfect and equity will enforce them against the donor and all persons claiming under him as volunteers."

Shukert's deed of trust was executed and delivered in Nebraska and is to be construed according to the laws of Nebraska.

In *Morris* v. *Linton*, 74 Neb. 411, an executed trust was defined as follows:

" 'The distinction between trusts executed and executory is this: A trust executed is where the party has given complete directions for settling his estate with perfect limitations; an executory trust is where the directions are incomplete and are rather minutes or instructions for the settlement.' "

This definition was quoted from *Nebbs* v. *Scott*, 9 How. 196, 211.

By the Shukert deed of trust the property was transferred absolutely to the trustee. The trustee was given complete power and dominion over the property. The rights of the beneficiaries were clearly, definitely and irrevocably declared. The donor reserved no right of control or interest of any kind in the trust property. Nothing remained to be done to complete the trust.

It was a completely executed trust upon delivery. Pos-

session of the trust property passed at once to the trustee; to the extent of its fees, the trustee acquired a beneficial interest in the trust.

The trust transfer clearly took effect in possession during the life of the grantor.

Did it take effect in enjoyment?

One of the definitions of "enjoy" given by Webster is "to have the benefit of."

The word "enjoy" means to have, possess and use with satisfaction; to occupy or *have the benefit* of.

Board of Trustees v. *Dimmitt,* 113 Mo. App. 41, 45.

Upon the delivery of the deed of trust, the beneficiaries acquired an interest in a large fund, in which they had previously had no interest. The income of the trust fund began at once to accumulate for their benefit. The deed of trust contained no spendthrift provisions. It contained no restrictions upon the right of the beneficiaries to alienate their interests under the trust. They acquired a right to sell and transfer their interests.

They were in enjoyment of substantial benefits under the deed of trust immediately upon its execution.

The right to receive the trust property on February 1, 1951, was given to three named beneficiaries, Isabel C. Shukert, Gustave Emil Shukert and Flora G. Shukert. They were given the fixed right of enjoyment.

This right they acquired in their father's lifetime and the right was in no way affected by his death. Whether he lived or died their interests remained unchanged.

We contend that the beneficiaries acquired a vested interest under the trust deed, which was subject to be di-

III.

If the court holds that the instruction to the jury in this case was wrong, then the decisions of the District and the Circuit Court of Appeals should be reversed and the case remanded to the District Court for another trial.

The petitioners will then have the right to have submitted to a jury the question of fact, whether the deed of trust was made in contemplation of death.

It was contended in the Circuit Court of Appeals that in as much as both the plaintiffs and defendants requested the court to direct a verdict, there was no question left to be submitted to the jury.

The complaint in the District Court alleged that the deed of trust was not made in contemplation of death. (Rec., 8.)

The petitioners moved the court for peremptory instruction to the jury to find for the plaintiffs. (Rec., 112.)

It does not appear from the record that this motion was passed upon by the court.

It was in effect overruled, since the court instructed the jury to find for the defendant because "under the undisputed evidence the trust created by Gustave E. Shukert in his lifetime was intended to take effect in possession or enjoyment at or after his death." (Rec., 114.)

This court said, in *Empire State Cattle Co.* v. *Atchison Railway Co.*, 210 U. S. 1, 8:

> "It was settled in *Beuttell* v. *Magone, supra,* that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts

to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction and yet, upon the refusal of the court to give it, insist by appropriate requests upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent."

To the same effect are *Schmitt* v. *Bank of Commerce*, 234 U. S. 64, 66; *Sampliner* v. *Motion Picture Co.*, 254 U. S. 233.

We respectfully submit that the judgments of the District Court and the Circuit Court of Appeals should be reversed and this case remanded to the District Court of Nebraska, Omaha Division, for a new trial.

Respectfully submitted,

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1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty ($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above named children of the Founder shall die leaving issue before the termination of this Trust, then the share in said Trust Fund of the one so dying then shall go to such issue, if one the whole, if more than one then in equal shares, provided, however, that such issue shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above named beneficiaries shall die without issue before the termination of this Trust, then the share

he or she would have taken if living shall be divided among the surviving beneficiaries *per stirpes* and not per capita.

3. Investments and reinvestments of said Trust Fund may be made by the Trustee at any time as may be in the best interest of the Trust Fund.

4. Investments and reinvestments are to be made preferably in United States, State and Municipal Bonds, and in such other securities, not including stocks, as are legal investments for trust funds.

5. The Founder at any time hereafter may deliver to the Trustee additional property for the purpose of adding to the principal of the trust fund created by this instrument. In this case the Founder shall file with the Trustee an instrument in writing duly signed by himself describing such additional property and stating that he delivers the same for the purpose of making it a part of the principal of the trust fund created by this instrument. The Trustee, upon receiving such additional property and such written instrument, shall in writing acknowledge receipt of said property as a part of the Trust Fund created by this instrument, and deliver, or mail by registered letter, a copy of said receipt to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund. All such additional property which has been so delivered to and so received and receipted for by the Trustee as such under the provisions of this article, and any additional property received hereunder by the Trustee as such from any source shall be deemed to be and is hereby assigned, sold, transferred, set over and delivered to the Trustee in trust for the uses and purposes and especially subject to all the terms, conditions and provisions in this instrument contained and set forth. It is hereby agreed that all of said property when and if so received by the Trustee is received by it in trust and the Trustee hereby declares and agrees that it will hold the same (if and when it has been so received) together with all money and all property of every kind and character for which the same or any of the same may at any time be exchanged or which may in any manner result from or grow out of the same for the uses and purposes and especially subject to all the terms, conditions and provisions contained and set forth in this instrument to

the same effect as if such additional property so received by the Trustee under the provisions of this article or from any other source had been received by the Trustee as a part of the original trust fund at the time of the execution of this instrument.

6. It is understood and agreed that the trustee shall receive as compensation of its services a sum equal to three (3%) per cent. of the income from said trust fund and shall be reimbursed for all necessary expenses in connection therewith. In no event is the Trustee to receive or be paid any compensation for collecting the principal funds of said trust, or for investing or reinvesting any funds belonging to said trust.

7. It is understood and agreed that the Trustee shall make annually a report in writing of its acts and doings as such Trustee showing income received, disbursements and charges, investments and reinvestments, and deliver or mail by registered letter, a copy of such report to the wife of the Founder, if living, and to each of the beneficiaries of said Trust Fund.

8. Immediately after the execution of this agreement, the Trustee shall prepare and deliver to the wife of the Founder, if living, and to each of the beneficiaries, above named, a duly certified copy of this instrument.

Signed this 5th day of May, A. D. 1921.

G. E. SHUKERT,

UNITED STATES TRUST COMPANY OF OMAHA, NEBRASKA, AS TRUSTEE,

By ABRAHAM L. REED,
President.

Witnesses:

M. B. GULICK,

SARAH M. LEMLEY.